U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

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CASE NOS.: 2003-LHC-01832
2003-LHC-01938
2003-LHC-01939

OWCP NOS.: 1-153268
1-157635
1-157633

GLENN A. HILL
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insured

Appearances:

Marcia Cleveland, Esquire, Topsham, Maine,
for the Claimant

Stephen Hessert, Esquire, Portland, Maine,
for the Employer

DECISION AND ORDER AWARDING CLAIM IN PART AND DENYING CLAIM IN PART

I. Statement of the Case

This proceeding arises from a claim for workers' compensation benefits filed by Glenn Hill, against Bath Iron Works Corporation ("BIW" or "Employer") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in Portland, Maine on November 19, 2003, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The

parties offered stipulations, and testimony was heard from the Claimant, a private investigator and a vocational rehabilitation specialist. Documentary evidence was admitted without objection as Claimant's Exhibits ("CX")1-16. The Claimant objected to all but two of the Employer's Exhibits on the ground that they were not provided in a timely fashion. TR 12-13. After hearing the parties, the Employer's Exhibits ("EX") 1-51 were admitted over the Claimant's objection. TR 12-16. Hearing Transcript ("TR") 10-16. The official papers were admitted without objection as ALJ Exhibits ("ALJX") 1-4. Thereafter, the parties filed briefs. The record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their closing arguments, I have concluded that the Claimant failed to establish that his right upper extremity injury involves a shoulder injury, and has failed to show that he has overuse injuries to the left upper extremity and both knees resulting from his work at the BIW shipyard.

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties stipulated to the following: (1) the Longshore Act applies; (2) an employer/employee relationship existed at all relevant times; (3) an injury to the right hand and wrist occurred on December 21, 2000; (4) the injury arose out of and in the course of the Claimant's employment; (5) the average weekly wage at the time of the December 21, 2000 injury was $793.01; (6) the notice and controversion of the claim for the December 21, 2000 injury were timely. TR 5-6.

The issues in dispute are (1) whether the notices for the alleged June 7, 2001 overuse injuries to the left upper extremity and both knees were timely; (2) whether the injury of December 21, 2000 is a scheduled or unscheduled injury; (3) whether the overuse injuries alleged to have occurred on June 7, 2001 to the knees and the left upper extremity, in fact, occurred; and (4) the nature and extent of disability of all three injuries.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant, Glenn Hill, is 47 years old. He began working at Bath Iron Works in 1982 as a laborer and he became a spray painter in 1984-85. TR 23-24. He testified that his duties as a spray painter included using several pneumatic tools including a sprayer, grinder, needle gun, and an air chisel and working in overhead positions. TR 25-28, 30-36. Depending upon the tool he was using the Claimant stated he alternated hands or used both hands to operate his tools. 37, 30-32. The Claimant is left-hand dominant. TR 32. He testified that most of his spray painting was done with his left hand. TR 55. The Claimant explained that he spray painted in both small and large tanks. The smallest tank was 20 to 25 inches and he was required

to crawl through an 18 inch opening to access the tank. TR 24-27, 37-38. Other tanks were quite large. *Id.*

On December 21, 2000, the Claimant injured his right hand and wrist while working overhead using a grinder. TR 39-41. The Claimant explained that he was grinding and hit a cable tray run light which drove his right hand back a foot into a stiffener. *Id.* He was initially treated at the shipyard first aid and then was sent to the hospital. TR 43; EX 35. In February 2001, the Claimant was referred to Dr. John Van Orden, an orthopedist who diagnosed extensor tendonitis and a tear of the triangular fibrocatilage of the wrist and placed him in a short-arm cast. CX 12 at 85. When the Claimant continued to have symptoms, Dr. Van Orden referred the Claimant to Samuel Scott, M.D., who is board certified in orthopedic surgery and specializes in surgery of the hand to the elbow. CX 16 at 111. Dr. Scott diagnosed carpal tunnel syndrome and trigger finger on the right hand. CX 12 at 87. Dr. Scott performed surgery on the right hand to treat the carpal tunnel syndrome and the trigger finger on June 28, 2001. CX 11 at 77. Between the injury date of December 21, 2000 and the date of his carpel tunnel surgery on June 28, 2001, the Claimant did not lose time from work. He testified that he continued working his regular job without any accommodation until he went out for carpal tunnel release surgery on June 28, 2001. TR 42-43, 54; EX35. The Claimant did not experience a positive result from surgery as he continues to experience numbness and tingling in his right hand. He has not returned to work since his surgery. TR 44. On October 8, 2002, the Claimant amended the December 21, 2000 injury claim for the right hand and wrist to include the right shoulder. CX 1; EX 6; EX 7.[1]

On January 22, 2003, the Claimant filed two additional injury claims alleging that he suffered overuse injuries on June 7, 2001 to the left hand/arm/shoulder and both knees. CX 3; EX 15; EX 16 and CX 2; EX 21; EX 22.[2]

Dr. Scott first saw the Claimant for his right hand/wrist injury on May 9, 2001 . CX 11 at 74; CX 16 at 111. Dr. Scott stated that the injury of December 2000 caused an extensive tenosynovitis and a dorsal ganglion over the 4th and 5th dorsal compartments. *Id.* By the time Dr. Scott first saw the Claimant, five months after the traumatic injury, he diagnosed the Claimant's main condition as carpal tunnel syndrome and trigger finger of the right hand. *Id.* He referred the Claimant for EMG studies. *Id.*; CX 16 at 122. Dr. Scott testified that carpal tunnel was the result of the Claimant's work at the shipyard over time. CX 16 at 113. On June 28, 2001, Dr. Scott performed carpal tunnel release on the right hand as well as an A-1 pulley release of the right middle finger. CX 11 at 75-78. Dr. Scott explained that chronic compression of the nerve can result in damage that may or may not improve with surgery. CX 16 at 115-116. Dr. Scott acknowledged that the Claimant had a poor result from his carpal tunnel release surgery as nerve conduction studies performed after the surgery continue to show nerve damage or nerve

[1] The Employer has paid temporary total disability benefits for the right hand/wrist injury from June 28, 2001 through May 30, 2002 and temporary partial benefits for this injury from May 30, 2002 through December 16, 2002. On January 8, 2003, the Employer paid the Claimant a scheduled award for a 6% permanent impairment of the right upper extremity involving the hand/wrist. EX 3; EX 5; EX 8; EX 10.

[2] In the Spring of 2003, the Claimant applied for and was awarded Social Security disability benefits. The Claimant continues to receive those benefits. TR 68-70, 81-82.

compression in the right hand and the Claimant continues to have pain, numbness and swelling. CX 16 at 116-117. He testified that the surgery corrected the Claimant's trigger finger condition. CX 16 at 123, 128. On May 31, 2002, Dr. Scott addressed a note to "To Whom It May Concern" stating the Claimant "should not do any lifting greater than 2 lbs., no use of vibratory tools, and limited gripping and pinching." CX 11 at 80. Dr. Scott testified that this restriction applied only to the Claimant's right hand, CX 16 at 133. At the January 2003 appointment, Dr. Scott modified the previous restrictions to include both hands and stated the restrictions were permanent. CX 16 at 120, 138-139; CX 11 at 83.

The Claimant had two independent medical examinations at the request of Bath Iron Works. The first with was with Christopher Brigham, M.D. who is board certified in occupational medicine. Dr. Brigham evaluated the Claimant on two separate occasions, the first on April 23, 2002 and the second on December 18, 2002. CX 10. His evaluation included a review of the medical records and an examination of the Claimant. In his April 2002 report, Dr. Brigham notes that the Claimant continues to experience numbness and pain in his right hand from the elbow to the shoulder and that use of the hand increases the pain. The Claimant reported that his pain was a seven on a scale of one to ten. CX 10 at 39. Dr. Brigham concluded that the Claimant continues to have significant problems with his right hand and wrist and has documented carpal tunnel syndrome. CX 10 at 49. He also stated that the surgery performed by Dr. Scott corrected the trigger finger condition and that there is no evidence of this as an ongoing problem. *Id.* On examination, Dr. Brigham indicated the right shoulder was normal. Although Dr. Brigham's report notes that arc, resisted motions, and passive motions were reported as uncomfortable, there was no tenderness over the right anterior shoulder and impingement tests were negative. CX 10 at 42. Examination of the left shoulder was normal. CX 10 at 43. Dr. Brigham also noted significant calluses on the Claimant's hands, particularly the left and commented that the calluses were inconsistent with the Claimant's reported activity level. CX 10 at 41. Dr. Brigham observed that the Claimant has generalized osteoarthritis and patellofemoral dysfunction with crepitation on palpitation. CX 10 at 49.

At his December 2002 evaluation, Dr. Brigham notes that the Claimant continues to experience pain and swelling in his right wrist and the right shoulder over the acromiclavical (AC) joint and the rotator cuff region. CX 10 at 56. The Claimant rated his pain over the last eight months as a fairly constant 10 on a scale of one to ten. Dr. Brigham noted the Claimant was scheduled to see his primary care physician for right shoulder pain. The Claimant reported he could lift only ½ pound on occasion. *Id.* On examination Dr. Brigham noted mild diffuse swelling of the right hand. Examination of the shoulders was normal with arc, resisted motions and passive motions being pain-free. There was tenderness over the right AC joint and the trapezius. CX 10 at 59. Dr. Brigham concluded that the Claimant's right hand and wrist condition remains. He noted the Claimant now has a shoulder problem and attributes the shoulder issue to a combination of rotator cuff disease and degenerative arthritis of the AC joint. He notes minimal deficits in range of motion of the right shoulder. CX 10 at 70. He opined that it was probable that the Claimant reached maximum medical improvement one year after his carpal tunnel surgery or June 2002. *Id.* Therefore, after evaluating the claimant, Dr. Brigham assessed a permanent impairment rating attributing 6% of the impairment to his upper extremity as a consequence of his work at BIW. CX 10 at 72. Dr. Brigham concluded that the Claimant had a light work capacity with restriction on the use of his right hand for repetitive or forceful

tasks. He is precluded from using vibratory tools and can lift up to five pounds with the right hand. *Id.*

G.T. (Tom) Caldwell, M.D., performed the second independent medical evaluation of the Claimant in October 2003. EX 51. Dr. Caldwell is board certified in physical medicine and rehabilitation. Dr. Caldwell reviewed the medical records and examined the Claimant. In the course of his evaluation, Dr. Caldwell considered the knee injuries of October 29, 1986, the right hand/wrist injury of December 21, 2000, and the June 7, 2001 injury involving the left hand and shoulder. Dr. Caldwell indicates that the Claimant reported increased pain, swelling and numbness in his hands with activity. Although he is able to dress and feed himself, he reports he cannot carry hot liquids, is unable to take the trash out, work on cars, use vibratory tools or grip other tools. EX 51 at 221-222. Dr. Caldwell noted that the Claimant had recently seen Dr. Keroack who diagnosed osteoarthritis, most notably in the knees. EX 51 at 222; CX 13 at 88. The Claimant also told Dr. Caldwell that he injured his knees in 1986.

On examination, the Claimant's hands were mildly calloused and demonstrated good muscle development without atrophy. EX 51 at 223. His grip strength was minimal. He had full range of motion of the shoulders, although he demonstrated pain behavior and complained of pain with movement of the shoulders and knees. *Id.* The Claimant was able to walk without difficulty, but moved slowly. He had mild crepitus in both knees, but the knees were stable with full range of motion with the exception of squatting. *Id.*

Dr. Caldwell concluded that the Claimant's recent nerve conduction studies confirm that he continues to have carpal tunnel in the right hand, and that the condition is related to his work at the shipyard. CX 51 at 224. Dr. Caldwell also stated that the Claimant has osteoarthritis in the knees, most likely from chrondromalacia patella. Dr. Caldwell opined that the knee problem is not related to work, noting the knee injury was 20 years ago and that the Claimant's medical records indicate he has preexisting predisposition to osteoarthritis. Dr. Caldwell stated that the knee condition would be the same regardless of whether the Claimant worked or not. He noted the Claimant had not worked in any heavy duty capacity since June 2000 and continued to have the same complaints with his knees. *Id.*

Noting that the Claimant does have osteoarthritis in both knees and carpal tunnel syndrome especially on the right Dr. Caldwell states it is reasonable to limit his work activities. Dr. Caldwell directs that the Claimant should avoid squatting and kneeling, and should climb ladders or stairs or work on his knees only minimally. With regard to his carpal tunnel syndrome, Dr. Caldwell indicates the Claimant should not use vibratory tools more than minimally. He states the Claimant can lift, push, pull and carry up to 50 pounds on a frequent basis and up to 25 pounds on an occasional basis. *Id.* at 225.

The Claimant was treated by Dr. Patrick Fallon on January 30, 2003 for a complaint of right shoulder pain. CX 14 at 89. Dr. Fallon diagnosed rotator cuff tendonitis, bursitis and AC joint arthritis. He treated the Claimant over several months with physical therapy, anti-inflammatory medication and steroid injections. By June 2003, the Claimant was "completely asymptomatic" had full range of motion and good strength in the right shoulder with no impingement. CX 14 at 92.

In September 2003, Bath Iron Works hired Steven Gauvin, a private investigator, to investigate the Claimant's activities. TR at 86-87. His investigation covered several days in September 2003 and included observing and videotaping the Claimant's activities. TR at 88, 92; EX 32. Mr. Gauvin prepared an investigative report dated October 1, 2003. EX 31. Mr. Gauvin admitted that the quality of the video was affected by the fact that he was shooting into a garage and a shadow line obscured the image. TR at 92, 98. Mr. Gauvin stated that he was able to see the activities in the garage better than what he was able to record on the videotape. TR at 90-93. He testified that on September 18, 2003, he observed the Claimant alone in his garage. Mr. Gauvin testified that although it was difficult to distinguish what the Claimant was doing on that date, he heard power tools being operated on and off for a period of two to two and one-half hours. TR at 94, 113.

Mr. Gauvin testified that on September 25, 2003 he observed the Claimant and a younger man in the Claimant's garage. Mr. Gauvin saw the Claimant hand-sanding a four-legged stool using a piece of sandpaper and vigorously sanding the stool. TR at 95-96. He stated that the Claimant continued hand-sanding for approximately 20 minutes and was using both hands. TR 97-99, 114-115.

On September 29, 2003, Mr. Gauvin observed the Claimant in his garage using a power sander to sand a four-legged stool. TR at 100. This activity continued for 35-45 minutes with occasional short breaks in the activity. TR at 102. On cross-examination, Mr. Gauvin acknowledged that he observed Mr. Hill's activities from a distance of from 60-110 feet away. TR at 105. He also stated that at times he could not see what the Claimant was doing with his hands and did not know whether he may have been resting his hands during some of the breaks in the operation of the sander. TR at 111, 114-115.

B. Timeliness of Notice for the Left Upper Extremity and Bilateral Knee Injuries

Section 12 of the Act requires that written notice of an injury or death which is compensable under the Act must be given within 30 days of the date of the injury or death, or within 30 days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. 33 U.S.C. 912. The Claimant filed Notices of Injury for the left upper extremity and bilateral knee injuries on January 22, 2003 alleging that the injuries occurred on June 7, 2001. At the hearing the Employer raised a notice defense with regard to both injuries. The Claimant concedes that he did not give notice of his left upper extremity and bilateral knee injuries within 30 days of those injuries. Cl. Br. at 10. In fact, the Claimant did not provide notice of those alleged overuse injuries until 18 months after the injuries were alleged to have occurred.

Section 12(d) of the Act provides that failure to provide the notice required will not bar a claim under certain circumstances. Both parties acknowledge that under Section 12(d), failure to provide timely notice of an injury will not bar a claim if the Employer or its insurance carrier had actual knowledge of the injury, or if it is determined that the Employer or carrier has not been prejudiced by the failure to give notice. Cl. Br. at 10; Emp. Br. at 9. The Claimant asserts

that the Employer had actual notice of both the left upper extremity and bilateral knee injuries and that the Employer has not shown prejudice as a result of his failure to provide timely written notice. The Employer makes no argument other than to state that the notice was untimely and the Employer does not argue that it has been prejudiced by the late notice. In the present case, the Employer has not shown any prejudice to its defense by the Claimant's untimely notice. Therefore, I find that the Claimant's injury claims are not barred even though he failed to provide notice of the injuries within 30 days of the date the injuries occurred.

C. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Company v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the Claimant has invoked the presumption, and the burden of proof shifts to employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Director, OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Director, OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal MaritimeServ.Corp.*, 29 BRBS 18 (1995); *Sprague v. Director, OWCP,* 688 F. 2d 862 (1st Cir. 1982).

Right Upper Extremity Injury- December 2000

In the present case, with regard to the December 2000 injury, the Claimant contends that the December 21, 2000 injury is an overuse injury to the right hand, wrist and shoulder along with the consequences of the traumatic injury. Cl. Br. at 4, 7-8. The Employer concedes causation for the right wrist and hand portion of the injury but challenges causation as to any right shoulder injury. Emp. Br. at 2, 11-14.

In support of its prima facie claim that the shoulder injury was a part of the December 21, 2000 injury and is related to the Claimant's work at the shipyard, the Claimant asserts that quickly after the Claimant's December 21, 2000 traumatic injury to the right hand, his doctor's discovered an overuse injury to the whole arm. Cl Br. at 7. The Claimant asserts that Dr. Van Orden, who treated the Claimant right after the traumatic injury, referred the Claimant to Dr. Sullivan for diagnostic studies to determine if the Claimant had carpal tunnel syndrome. The Claimant also relies upon the report of Dr. Brigham, who assessed an impairment rating of the right upper extremity based, in part, on the Claimant's right shoulder condition. Cl. Br. at 7-8. Finally, the Claimant relies upon the medical records of Dr. Fallon, who treated the Claimant's shoulder condition from January to June 2003.

The Employer asserts that the documentary evidence points out that the December 21 injury was to the Claimant's right hand and wrist and not to the right shoulder. The Claimant filed a first report of injury for the right wrist/hand on January 4, 2001 alleging the injury occurred on December 21, 2000. CX 1. The Claimant added his right shoulder to the injury claim on October 8, 2002. Bath Iron Works contends that the claim was amended to add the shoulder long after the initial injury simply as a way to remove the injury from the scheduled provisions of Section 8(c) of the Act to an unscheduled injury. Emp. Br. at 3-4.

The Claimant asserts that Dr. Brigham's December 2002 report incorrectly states that the Claimant's shoulder complaints developed since his April 2002 report. A careful review of the initial April 2002 report indicates that no record of prior shoulder treatment was provided for Dr. Brigham's review and Dr. Brigham's physical examination of the Claimant's shoulders was normal. CX 10 at 35-38, 42-43. Dr. Brigham's several diagnoses do not include any reference to a shoulder dysfunction. CX 10 at 49. The only reference to the right shoulder pain is in the "Current Status" portion of the report which reflects the Claimant's statement that he has problems with his right hand with pain from his elbow to his shoulder. *Id.* at 39. At his second evaluation in December 2002, Dr. Brigham notes that the Claimant was to see his primary care physician that same day for right shoulder pain, which the Claimant stated has been increasingly problematic over the last year. CX 10 at 56. On examination in December, Dr. Brigham reports the shoulders are essentially normal with arc, resisted motions and passive motions pain-free and with minimal deficits in range of motion in the right shoulder. CX 10 at 56, 70. However, he notes tenderness over the right acromioclavical joint and the right trapezius which he attributes to rotator cuff disease and degenerative arthritis. *Id.* Dr. Brigham concludes that the Claimant has reached maximum medical improvement and he assessed a permanent impairment of the right upper extremity considering the Claimant's hand, wrist, elbow and shoulder. CX 10 at 72. In assessing the permanent impairment, Dr. Brigham did not opine that the shoulder restriction was related to the Claimant's employment. This is in sharp contrast to his statement that the

Claimant's ongoing carpel tunnel syndrome is related to his employment. CX 10 at 49, 72. In addition, even though Dr. Brigham includes the minimal right shoulder range of motion deficits in assessing a permanent impairment rating, his report states that the Claimant's right shoulder may improve with exercise. In fact, by June 2003, the Claimant's shoulder range of motion did improve and the associated pain resolved after a course of physical therapy and treatment with Dr. Fallon.

Dr. Fallon first saw the Claimant for right shoulder pain on January 30, 2003. Although his office note indicates the shoulder condition is longstanding, the note does not cite any medical records or objective evidence to support this statement. Moreover, after diagnosing rotator cuff tendonitis, bursitis and AC joint arthritis, Dr. Fallon successfully treated the Claimant's shoulder condition over a five month period. By the Claimant's June 2003 visit, Dr. Fallon's note indicates the Claimant's shoulder is "completely asymptomatic," had full range of motion and good strength with no impingement. Notably, Dr. Fallon does not state that the shoulder condition which he successfully treated was caused by the Claimant's work at the shipyard. Therefore, Dr. Fallon's records do not support the Claimant's assertion that the short-term right shoulder condition was caused by his work at the shipyard.

After reviewing the record and considering the parties' arguments, I conclude that the Claimant has failed to establish that his right arm/wrist injury includes an injury to the shoulder. The evidence establishes that there was no complaint of a shoulder condition in June 2001 when the injury is alleged to have developed. The evidence establishes that the Claimant did not seek treatment for right shoulder complaints until the late fall of 2002, almost two years after the December 2000 injury and some sixteen months after the right carpel tunnel release surgery. By this time, the Claimant had not performed any work requiring use of his shoulders in sixteen months. Moreover, no physician has stated that the shoulder arthritis or rotator cuff tendonitis resulted from the Claimant's work at the shipyard. The Claimant sought treatment for his shoulder pain in January 2003, and he was successfully treated, regaining full range of motion without pain by June 2003. There is no medical evidence of any ongoing shoulder condition. Thus, I find that the Claimant has not established that his right upper extremity injury in December 2000 included a shoulder condition. Accordingly, I find that the Claimant has failed to establish a prima facie case of causation as regards a right shoulder injury.

Left upper extremity overuse injury - June 7, 2001

The claim for an overuse injury to the left hand, arm, wrist and shoulder alleging an injury on June 7, 2001 was not filed until January 22, 2003. CX 2. The Claimant alleges an overuse injury resulting from grinding at the shipyard. The Claimant contends that he has an overuse injury to the upper extremities, including his carpal tunnel syndrome which he asserts is bilateral and work related and that his overuse syndrome of the upper extremities involves the shoulders. The Employer argues that the alleged left upper extremity injury of June 7, 2001 is simply a date of convenience representing the date the Claimant left work to have carpal tunnel

surgery on his right wrist and that there is no credible evidence of a gradual injury to the left upper extremity on or about that date. Emp. Br. at 2-3, 16. [3]

The Claimant relies upon Dr. Scott for support of his contention that he has an overuse injury to the left upper extremity involving the hands/wrist, arm and shoulder. Cl Br. at 4-5. The Claimant does not address the medical evidence supporting the alleged left arm, hand, wrist and shoulder injury separately from the evidence related to the right upper extremity injury. Rather, the Claimant's brief discusses the right and left upper extremity conditions together and in doing so overstates the medical evidence with respect to the left upper extremity injury in this case.[4]

The medical evidence indicates that a February 5, 2001examination by Dr. Van Orden, an orthopedist, soon after the Claimant's traumatic injury to the right hand/wrist, showed a normal examination of the left wrist. CX 12. Dr. Scott initially saw the Claimant on May 9, 2001 and his examination of the Claimant revealed normal grip strength in the left hand and diminished grip strength in the right hand with negative Phalens tests. CX 11. Dr. Scott ordered nerve conduction studies and studies were conducted on the Claimant's right hand/wrist. On June 8, 2001 Dr. Scott diagnosed right carpel tunnel syndrome and triggering right middle finger. CX 11 at 75-76. Dr. Scott performed carpel tunnel release surgery on the right hand/wrist on June 28, 2001. CX 11 at 77; CX 16 at 125.

The first mention of left hand/wrist condition by Dr. Scott is in his March 8, 2002 letter to Dr. Collins. The letter to Dr. Collins primarily addressed the Claimant's continued right hand carpal tunnel symptoms post-surgery, requested repeat nerve conduction studies of the right wrist/hand and stated that the Claimant has developed symptoms in the left hand. CX 11 at 79. As a result of continued symptoms of numbness and pain, Dr. Scott imposed work restrictions applicable only to the Claimant's right hand and wrist on May 31, 2002. CX 11 at 80. Although Dr. Scott initially testified that he diagnosed left carpal tunnel syndrome when he first saw the Claimant on May 9, 2001, he conceded there is no reference to left carpal tunnel syndrome in his contemporaneous notes. CX 16 at 120-122. Dr. Scott also candidly acknowledged that he could not say what left hand symptoms he was referring to in his March 8, 2002 letter to Dr. Collins and he testified that the Claimant "may or may not have had symptoms in his left hand of carpal tunnel syndrome in the manner that he had them in his right" before the right carpal tunnel release surgery in June 2001. CX 16 at 130. Dr. Scott admitted that when he initially evaluated the Claimant he was not considering carpel tunnel surgery on the left. Dr. Scott acknowledged that the Claimant's left hand/wrist was never studied for carpel tunnel syndrome. CX 16 at 116-117.

On cross-examination, Dr. Scott explained that when he diagnoses bilateral carpel tunnel he tends, in most cases, to have nerve conduction tests performed on only one side as he did with the Claimant. CX 16 at 125-126. He explained he does this because carpel tunnel is a diagnosis

[3] It is also noteworthy that when the left upper extremity overuse injury claim was filed in January 2003 the Claimant had done no grinding or other work with his hands at the shipyard since he left the yard eighteen months earlier on June 7, 2001 for right carpal tunnel release surgery.

[4] I note that the Claimant has limited motion of the left elbow as a result of a traumatic injury several years earlier. There was no evidence presented showing that the pre-existing left elbow injury was work-related.

made on the basis of multiple factors and every factor does not have to be positive. However, in the present case, the examination findings on the left hand/wrist including the Claimant's grip strength were essentially normal and his Phalen's test was negative. Nor were nerve conduction studies, which are a recognized and accepted objective diagnostic tool for evaluating carpel tunnel syndrome, performed on the Claimant's left wrist/hand. Thus, several of the factors Dr. Scott would normally expect to see in making a positive carpel tunnel diagnosis were not present. Dr. Scott's diagnosis of left carpel tunnel is based exclusively on the Claimant's later report of numbness in the left upper extremity.

In fact, Dr. Scott did not provide the same work restrictions for the left wrist/hand as had been in place for the Claimant's right hand until January 3, 2003. CX 11 at 82-83. Therefore, Dr. Scott's records provide little support for the Claimant's assertion that he had overuse or carpal tunnel injuries to the left hand/wrist as of June 7, 2001 or thereafter. As noted above, the earliest reference to left hand problems is in Dr. Scott's May 8, 2002 letter to Dr. Collins and that letter does not include any objective examination findings or physical limitations of the left hand/wrist.

Dr. Brigham twice reviewed the Claimant's medical records and examined the Claimant on behalf of the Employer. In his initial examination in April 2002, he noted significant calluses on the Claimant's left hand and commented that this finding was inconsistent with the Claimant's reported sedentary activities. His physical examination of the left wrist and shoulder were essentially normal. Dr. Brigham's diagnosis included right wrist carpal tunnel syndrome and generalized osteoarthritis in both hands. Dr. Brigham's second examination, which occurred on December 18, 2002 revealed no abnormality of the left shoulder or wrist. Dr. Brigham's examination did show a limitation in extension of the left elbow.

The Claimant has also contended that the left upper extremity involves a shoulder component. Dr. Scott's records do not mention any shoulder condition until his note of January 3, 2003 in which he writes to the Claimant's primary care physician suggesting that a referral to a "shoulder person" in the Claimant's area would be appropriate. CX 11 at 81. Dr. Scott testified that he would have asked the Claimant about any neck or shoulder symptoms and he stated that if the Claimant had reported such symptoms to him before January 3, 2003, he would have recorded that information in his records. CX 16 at 118. The evidence establishes that the Claimant was referred to Dr. Fallon for shoulder pain in January 2003. Dr. Fallon examined the Claimant on January 30, 2003 and indicated that the Claimant had rotator cuff tendonitis, bursitis and AC joint arthritis of the right shoulder. CX 14. Dr. Fallon successfully treated the Claimant's right shoulder for several months in 2003. Notably, Dr. Fallon did not treat the Claimant's left shoulder and there is no indication in his notes of a left shoulder condition. There is simply no evidence of the Claimant seeking or receiving any medical treatment for a left upper extremity injury involving the shoulder. Accordingly, based upon the lack of objective examination findings of weakness in the left hand/wrist or diagnostic studies reflecting left nerve entrapment, along with the absence of a recorded diagnosis or treatment for left carpel tunnel syndrome by Dr. Scott in the May-June 2001 period, or any time thereafter, and the absence of treatment records for any left shoulder condition, I find that the Claimant has failed to establish

that a left upper extremity overuse injury or carpel tunnel syndrome involving the left hand/wrist/arm/shoulder arose from his work at the shipyard.[5]

Bilateral Overuse Injury to the Knees- June 7, 2001

With regard to the alleged bilateral knee injury of June 7, 2001, the Claimant contends that he had prior knee injuries which his physician deemed work related. He asserts that his parking lot attendant job at BIW in late 2002 or early 2003, which required him to step up and down from a booth, inflamed his knees to the point that his family physician, Dr. Fairchild, took him out of work. Cl. Br at 6. Thus, the Claimant asserts that he has overuse injuries to both knees as of June 7, 2001 which resulted from his work at BIW. *Id.* The Employer argues that the alleged knee injury of June 7, 2001 is simply a date of convenience representing the date the Claimant left work to have carpal tunnel surgery on his right wrist and that there is no credible evidence of a gradual injury to the knees on or about that date. Emp. Br. at 2-3, 15.

The record reflects that the Claimant had pre-existing knee injuries from 1986 and surgery to repair a left knee meniscus tear in the 1990s. The Claimant has had permanent work restrictions from Dr. Mendes as a result of chronic knee problems and arthritis of the knees. His restrictions, in place since at least 1995, include "no prolonged standing, sitting, stopping, squatting, or kneeling and no prolonged stairs, ladders and climbing." CX 35 at 92-93. The Claimant continued working in his regular position as a painter at BIW without any special accommodation after the knee limitations were imposed until June 2001 when he left work for carpal tunnel surgery. The work restrictions imposed for the knee condition in 1995 remain in place and are exactly the same limitations. There is no evidence of increased knee pain or knee treatment in the months immediately preceding June 7, 2001 the date the Claimant left work to undergo carpel tunnel surgery, and the date he claims the alleged overuse injury to his knees came to fruition.

After the carpel tunnel surgery, the Claimant returned to BIW part-time, in May 2002, as a parking lot attendant generally working two hours per day. He testified that his knee complaints increased for a few days around the time he was working in the last parking lot he was assigned to at Sup Ship, in late 2002 or January 2003, as he had to step up and down one step from a small shed to check badges. He testified that his knees began to swell up but stated "it wasn't bad." TR 50. There is no evidence in the record of a change in the Claimant's knee condition. There is no evidence of a new or different knee injury. Nor is there evidence that the Claimant sought ongoing medical treatment for a knee condition in 2002 or 2003. There is a January 20, 2003 State of Maine Workers' Compensation Board Practitioner's Report, a one-page form report from Dr. Fairchild, the primary care physician, indicating bilateral knee pain, arthritis, an exacerbation of pain and he checked a box on the form indicating no work capacity and that maximum medical improvement had not been reached. CX 7 at 28. The form report did not include any objective examination findings, results or treatment notes. Nor has the Claimant submitted any treatment records for his knee condition in the months since January 2003. The

[5] With additional treatment including current diagnostic testing and objective examination results, the Claimant may yet be able to establish left carpel tunnel syndrome. However, based upon the evidence presented before me, the Claimant has not shown that he has left carpel tunnel syndrome. Additionally, no permanent impairment rating for a left upper extremity condition was assessed or offered in this case.

Claimant has failed to show that an overuse injury to both knees occurred as a result of the Claimant's work at the shipyard on June 7, 2001 or thereafter. Therefore, the Claimant has failed to establish a prima facie case.

In sum, the parties agree and I find that the Claimant has established that his right upper extremity injury to the wrist and hand arose out of and in the course of his employment at BIW. I have found that the Claimant did not establish that the right upper extremity injury involved a shoulder injury. I have also concluded that the alleged overuse injuries to left upper extremity and both knees did not occur as alleged and that the Claimant failed to establish causation with regard to those injuries.

D. Nature and Extent of Injury

An employee such as the Claimant, who is entitled to permanent partial disability benefits based on an injury arising under the schedule found in section 8(c) of the Act, may be entitled to greater compensation under sections 8(a) and (b) by showing that he is totally disabled. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17 (1980) ("*PEPCO*"); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196, 199 (1984). However, if the employee does not establish that he is totally disabled, the compensation provided by the appropriate schedule provision for a permanent partial disability is his exclusive remedy under the Act. *PEPCO* at 274; *Winston v. Ingalls Shipbuilding*, 16 BRBS 168, 172 (1984). Disability is generally addressed in terms of its nature, temporary or permanent, and its degree, partial or total. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). The Claimant contends that he is permanently and totally disabled.

1. Nature of Disability – Temporary or Permanent

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask v. Lockheed Shipbuilding & Construction Co*., 17 BRBS 56, 60 (1985); *Seidel v. General Dymanics Corp.*, 22 BRBS 403, 407 (1989).

In the present case, the Claimant has been assessed a permanent impairment of the right upper extremity attributable to the work-related injury by Dr. Brigham. Dr. Brigham stated that the Claimant had reached maximum medical improvement in June 2002. CX 11 at 70. The Claimant's physician did not assess a permanent impairment rating, but he stated that the Claimant reached maximum medical improvement in January 2003. Accordingly, I find that the Claimant's right upper extremity injury is permanent.[6]

2. Extent of Disability – Total or Partial

[6] The Employer has accepted that the Claimant's right upper extremity impairment involving the hand and wrist as permanent and it has paid a scheduled award for a 6% impairment under Section 8(c)(1) of the Act. EX 10 at 10.

The next consideration is the extent of the Claimant's disability, partial or total. The Claimant has testified that he has very limited use of his hands. He testified that he can take care of his personnel needs such as dressing and shaving, but he does not change the oil in his car and he gets his son to do any house maintenance. TR 73-74, 82.

The various medical professionals in this matter have identified significantly different restrictions for the Claimant's activities. Therefore it is necessary to evaluate the restrictions and the underlying support for those restrictions in determining the extent of the Claimant's impairment.

Dr. Scott, the Claimant's physician, imposed significant restrictions on the Claimant's use of his hands. Dr. Scott's final permanent work restrictions imposed on January 3, 2002 limited lifting to two pounds, prohibited the use of vibratory tools and permitted limited gripping and pinching with both hands. Dr. Scott acknowledged that the restrictions he imposed were not based upon any objective findings or upon the carpel tunnel diagnosis, but rather, were based upon the Claimant's report of problems he had working and with activity, and hand/wrist pain and swelling. CX 16 at 133-134, 136-137, 139. Dr. Scott also stated that if a patient returned to him after he had imposed limitations and reported a capacity to perform the restricted activities, he would remove the limitations.

Even after assessing a 6% permanent impairment of the right upper extremity in December 2002, Dr. Brigham opined that the Claimant retained the capacity to perform work at the light exertional level. EX 41 at 149. Dr. Brigham stated that the Claimant has restricted use of his right hand and was not to perform any repetitive forceful tasks, but he stated the Claimant can make occasional use of his right hand to assist with other tasks. The Claimant is precluded from using vibratory tools with the right hand and his lifting limit using the right hand is five pounds. *Id.*

Dr. Caldwell also evaluated and examined the Claimant in October 2003. Dr. Caldwell reviewed the Claimant's medical records, as well as a surveillance tape of the Claimant's activities, and he examined the Claimant.[7] On examination, the Claimant had little grip strength, his hands were mildly calloused, with good muscle development and no atrophy, he moved slowly and vocalized complaints. Dr. Caldwell noted that the tape showed the Claimant "using tools" and "his hands repetitively in a number of ways for one-half hour or more." EX 51 at 224. He concluded that because the surveillance tape shows the Claimant using tools and using his hands repetitively in a number of ways for one-half hour he has a "work capacity that is quite a bit more than what was estimated by his treating physicians, especially, Dr. Scott" CX 51 at 224. Dr. Caldwell indicated the claimant can lift, push, pull or carry much more than two pounds and in fact can handle up to 25 pounds on a frequent basis and 50 pounds on an

[7] Surveillance evidence taken by Mr. Gauvin, a private investigator hired by the Employer, shows that the Claimant has greater use of his hands than he testified to. Although the video tape quality is somewhat obscured, the Claimant is clearly observed on the tape lifting and turning a wooden stool with both hands and sanding the stool with his hands and with a hand sander. The Claimant engages in this activity for a period of approximately 35 minutes on one day and again for less time on another day. The activity observed on the tape is consistent with Mr. Gauvin's testimony as to the activity he observed the Claimant engaging in during his surveillance monitoring.

occasional basis, but should avoid use of any vibratory tools such as a grinder.[8] With regard to his knees, Dr. Caldwell stated that the Claimant should avoid squatting and kneeling and should not work on his knees, climb ladders or stairs more than minimally.

Dr. Scott's work restrictions are the most restrictive. As a general matter, a treating physician's opinion is entitled to greater weight than the opinion of an examining physician, however, such is not the case under the circumstances presented here. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035 (2nd Cir. 1997) As noted, Dr. Scott's work restrictions on the Claimant's activities are not based upon objective examination or diagnostic findings, but rather, are based entirely upon the Claimant's statements as to what he can and can not do using his hands. The Claimant's testimony and his statements to the physicians as to his limited ability to use his hands are undermined by his actual activity as demonstrated on the surveillance tape. Although the video tape records the Claimant's activity over a limited period of time and does not establish the Claimant's ability to engage in such activity for an eight-hour period, the activity observed and recorded on the tape is certainly inconsistent with the Claimant's testimony as to his activity level, particularly his capacity to use his hands and it is inconsistent with the limitations imposed by Dr. Scott. Dr. Scott acknowledged that he had not seen the surveillance evidence but he conceded that if the tape showed the Claimant engaging in sanding furniture, lifting a stool with two hands and flipping it over while sanding, which it quite clearly does, such activity is more strenuous than the level of activity that he understood the Claimant was capable of performing and such activities are beyond the activity permitted by the work restrictions he assigned the Claimant. CX 16 at 140-141. Accordingly, I find that the Claimant's testimony with regard to the physical limitations he experiences using his hands is not credible.[9] Therefore, Dr. Scott's work restrictions which are based solely on the Claimant's report of what he can and can not do with his hands and not upon the Claimant's carpel tunnel syndrome or objective physical findings, are entitled to less weight.

In contrast, the restrictions imposed by both Dr. Brigham and Dr. Caldwell are supported by the Claimant's medical records and by objective examination findings. After considering all of the evidence, I find that the work restrictions established by Drs. Brigham and Caldwell are more consistent with and supported by the objective medical evidence and by the Claimant's physical capabilities as illustrated by the surveillance evidence than the restrictions established by Dr. Scott. I find that the Claimant has a work capacity consistent with Dr. Brigham's and Dr. Caldwell's opinions. Taking the two physician's work restrictions together, the Claimant can lift five pounds with his right upper extremity and should avoid use of vibratory tools. He can lift, push, pull or carry up to 25 pounds on a frequent basis and 50 pounds on an occasional basis

[8] Dr. Caldwell's report actually states that the Claimant is permitted "no lifting, pushing, pulling or carrying more than 50 pounds on a frequent basis and 25 pounds on an occasional basis." The doctor appears to have reversed the weight limits he intended to assign the Claimant for lifting on a frequent basis with the limits he assigned for lifting on an occasional basis. In assigning lifting limitations, physicians permit the lighter weight to be lifted on a more frequent basis and the heavier weight to be lifted on a less frequent, i.e., an occasional, basis. I conclude that the doctor simply made a mistake in reversing the weight limits he determined the Claimant can handle on a frequent basis with those the Claimant can handle on an occasional basis.

[9] The Claimant also reported to Dr. Brigham that his right upper extremity pain had been at a consistent 8-10 on a scale of 1-10. With a significant pain level of 8-10 one would expect that the Claimant would be taking narcotic medication to mitigate his pain. However, there is no evidence that the Claimant is taking pain medication.

with his left upper extremity. He is to avoid squatting and kneeling and can climb ladders or stairs only minimally. Having determined that the work restrictions imposed by Drs. Brigham and Caldwell are the appropriate work restrictions, it is necessary to determine whether the Claimant's disability is total or partial.

A three-part test is employed to determine whether a claimant is entitled to an award of total disability compensation: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals with the same age, experience and education as the employee which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991) (*Legrow*), quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir.1981).

With regard to the Claimant's initial burden of proving that he cannot return to his usual employment, there is little dispute that the Claimant is unable to resume his pre-injury employment as a longshoreman because his permanent restrictions on the use of his right arm preclude his use of vibratory or pneumatic tools and prohibit him from performing repetitive tasks. The independent medical experts both stated that the Claimant could not use vibratory tools. EX 41 at 149; EX 51 at 225. The Claimant's job as a spray painter at Bath Iron Works required him to use various pneumatic tools. Based upon this evidence, I find that the Claimant is unable to return to his usual employment as a longshoreman.

As the Claimant has established that he is unable to return to his usual employment, the burden shifts to Bath Iron Works to demonstrate the availability of suitable alternate employment or realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. To satisfy this burden, Bath Iron Works must show the "precise nature, terms, and availability of the job[s]." *Plourde v. BIW*, 34 BRBS 45, 48 (2000), quoting *Legrow*, 935 F.2d at 434.[10] The Employer has introduced a labor market survey and the testimony from Memama Abraham, a rehabilitation counselor with ten years of vocational rehabilitation experience in the Portland area. EX 34; TR 116-119. Mr. Abraham reviewed the Claimant's work history, education and medical records including the restrictions imposed by Dr. Caldwell, and he prepared a labor market survey. EX 33. Mr. Abraham's report identified the following jobs that were available in the Claimant's geographic area that were consistent with the Claimant's education, work experience and the physical restrictions identified by Dr.

[10] It is noted that the First Circuit has rejected "a mechanical rule . . . that the employer must always demonstrate the availability of an actual job opportunity whenever a claimant shows an inability to perform his previous work", stating that "it is reasonable to require the employer to make such a strong showing when a claimant's inability to perform any available work seems probable, in light of claimant's physical condition and other circumstances such as claimant's age, education, and work experience . . . [but not] [w]here claimant's medical impairment affects only a specialized skill that is necessary in his former employment . . . ." *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 779 (1st Cir. 1979).

Caldwell: sales representative at Advanced Tel Direct, cashier positions at Standard Parking, Portland Public Market Parking, Rowe Auburn, sales associate at Cumberland Farms, and security officer at Suburban Security. *Id.* Based upon his labor market survey, Mr. Abraham testified that the Claimant had an earning capacity of $360.00 per week.[11]

On cross-examination, Mr. Abraham acknowledged that some of the positions he identified required a high school diploma and that the Claimant did not possess a high school diploma. However, he asserted that the Claimant has established a significant work history over several years and has functioned at a high level. TR 137. He explained that with some positions requiring a high school diploma, an employee with a successful employment history can perform the job even lacking the diploma or GED. TR 143-147. Mr. Abraham acknowledged that he had not met with the Claimant and he did not assess the Claimant's reading or mathematical skills. TR 138.

The Claimant has challenged the Employer's vocational evidence on the ground that Mr. Abraham was not fully aware of the Claimant's qualifications as he did not know that the Claimant was illiterate and therefore he could not assess whether the jobs identified were suitable for the Claimant. Cl. Br. at 9. The Claimant attended high school, completing a portion of the 11th grade.[12] He testified that he left school to begin a family and not because he was unable to do his schoolwork. In fact, the Claimant testified that he had been passing his coursework all the way up to the time he left school to support his family. TR 80. This testimony and the Claimant's formal education level are inconsistent with the Claimant's assertion that he can read "very little." TR 78-79. After reviewing the record, I conclude that the preponderance of the evidence is insufficient for me to find that the Claimant is unable to read. There is no evidence that the claimant is unable to perform basic mathematical calculations.[13]

In assessing the suitability of the six positions identified by Mr. Abraham, I find that the security officer position is not suitable as that position requires climbing stairs. Two of the positions indicate that a high school diploma is required, the inbound sales representative position at Advance Tel Direct and the cashier position at the Portland Public Market Garage. Although the Claimant does not have a diploma, and Mr. Abraham testified that although the diploma may be listed on the vacancy notice, employers may accept individuals with a demonstrated successful work history even though those individuals do not possess a high school diploma, Mr. Abraham did not state that the employers he identified would consider the Claimant without a high school diploma. Therefore, I find that the Employer has not shown that these positions are suitable. The cashier positions at Standard Parking and at Rowe Auburn and the sales associate position at Cumberland Farms are consistent with the Claimant's education, experience, age and physical limitations are therefore suitable. Accordingly, the Employer has met its burden of establishing jobs have been available in the Claimant's community since at

[11] Mr. Abraham also testified that even using the more restrictive physical limitations identified by Dr. Scott there remained a stable labor market with the jobs he had identified, although the number of jobs would be less.

[12] The Claimant testified at one point that he completed the 11th grade. TR 78.

[13] The Claimant testified that his wife handles the checkbook at home. TR 83. This does not establish that the Claimant is unable to perform simple mathematical calculations.

least September 14, 2003 which the Claimant could realistically obtain and successfully perform with his limitations. Since the Claimant has offered no rebuttal that he made diligent, but unsuccessful, attempts to obtain the type of suitable alternative employment identified by Mr. Abraham, I conclude that the Employer has met its burden of demonstrating the existence of suitable alternate employment and thereby established that the Claimant is not totally disabled.

In light of the Claimant's failure to establish that he is totally disabled as a result of the injury to his right hand/wrist, the compensation provided by the appropriate schedule provision for a permanent partial disability is, as Bath Iron Works contends, his exclusive remedy under the Act. *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 277 n. 17 (1980) ("PEPCO"). A permanent partial disability falls under Section 8(c) of the Act. Sections 8(c)(1)-(20) establish minimum levels of compensation to which an injured employee is entitled without proof of actual loss of wage-earning capacity. 33 U.S.C. 908(c)(1). *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 143 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). If the injury is to a body part specifically identified in the schedule set forth in 8(c)(1)-(20) of the Act, 33 U.S.C. 908(c) (1)-(20), a claimant is entitled to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired. *PEPCO,* 449 U.S. at 277. A permanent partial disability of the hand/wrist is an injury to one of the scheduled body parts in Section 8(c) and is specifically addressed in Section 8(c)(1) of the Act. In the present case, the Employer has paid a scheduled award for a 6% permanent impairment of the hand/wrist in December 2002.[14] This is the total compensation the Claimant is entitled to under the Act.[15] This is so even though the Claimant's inability to use vibratory tools precludes his return to his job as a painter at BIW as the Employer has established that suitable alternate employment exists. While this may seem a harsh result under the circumstances here, the Supreme Court has held in *PEPCO* that an individual with a permanent partial injury to a scheduled body part is limited to the compensation provided by the specific statutory provision enacted by the legislature. Therefore, having received an award for a 6% permanent impairment from the Employer, the Claimant has received the compensation he is entitled to under the Act for his right hand/wrist impairment.

III. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

(1) The Claimant, Glenn A. Hill, is entitled to compensation under Section 8(c)(1) of the Act for a 6% permanent partial disability of the right hand/wrist. 33 U.S.C. 908(c)(1). The Employer, Bath Iron Works, has already paid the Claimant the scheduled award due for his right hand/wrist injury.

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[14] As noted, the Employer has also paid temporary total disability benefits from June 28, 2001 through May 30, 2002 and temporary partial disability benefits from May 30, 2002 through December 16, 2002 for the right hand/wrist injury.

[15] The Claimant has not argued that the permanent impairment to his right hand/wrist is greater than 6%. *See* Claimant Brief.

(2) The Claimant's remaining claims alleging injuries to the left upper extremity and the bilateral knee injury are denied.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts